

Agenda Report

TO: CITY COUNCIL

DATE: January 25, 2010

FROM: CITY ATTORNEY

SUBJECT: SUPER LIQUOR'S REQUEST FOR RECONSIDERATION OF
CONDITIONS OF OPERATION IMPOSED PURSUANT TO THE
DEEMED APPROVED ORDINANCE

RECOMMENDATION

Staff recommends that the conditions of operation imposed on Super Liquor by the Code Enforcement Commission, as affirmed by the City Council on Super Liquor's appeal, not be modified as requested. However, clarifying language may be added to certain conditions by the City Council, as indicated in the body of the agenda report.

BACKGROUND

Super Liquor appealed the Code Enforcement Commission's imposition of conditions of operation under the Deemed Approved Ordinance. The City Council heard the appeal on July 27, 2009. After hearing evidence from the public and the appellant, the City Council affirmed the Code Enforcement Commission's decision and imposed conditions of operation. Super Liquor has requested that certain of those conditions be modified, claiming that they are overreaching and/or preempted by state law.

The City Attorney's Office has engaged in discussions with Super Liquor regarding the modification of conditions. The requested modifications require City Council approval. The agenda report presented to the City Council on July 26, 2009, at Super Liquor's initial appeal hearing, and the Conditions imposed by the City Council are attached hereto as Exhibits 1 and Exhibit 2, for the Council's ease of reference.

This office has discussed the modification of conditions requested by Super Liquor with both the Police Department and Code Enforcement. Their recommendations are included herein.

SUPER LIQUOR SEEKS TO MODIFY THE FOLLOWING CONDITIONS

Super Liquor seeks to modify the following 5 conditions. For the Council's

convenience, the condition is set forth, in full, followed by Super Liquor's request for modification, and then staff's analysis and recommendation.

Condition 3 -- The sale or stocking of single containers of distilled spirits, beer, malt beverages, and wine coolers in sizes of 12 oz. or less is prohibited, but may be sold in manufacturer pre-packaged multi-unit quantities.

Request -- Remove "distilled spirits"

Analysis -- This condition relates to the "airline" size containers of distilled spirits. The record is clear that Super Liquor has significant problems relating to drinking in public, littering and loitering. The sale of small bottles of distilled spirits is part of that problem. Although staff believes that the record supports the need for this condition, and that it may be defensible, if challenged, this would be a question of first impression for the courts, and the potential exists that a court may invalidate such a requirement. Staff recommends that this condition not be modified unless the Council desires to strengthen its position by removing the reference to "distilled spirits," or unless information is presented at the hearing which would mitigate the need for full implementation of this condition.

Condition 9 -- Management shall employ a private security guard to patrol the business premises and the surrounding vicinity, including the north side of Orange Grove Boulevard adjacent to the property, during all hours of business operation for a distance of 50 feet in each direction from the subject site to ensure that no littering, loitering, or consumption of alcohol occurs.

Request -- In lieu of this conditions, adopt the additional security conditions as outlined in Exhibit E, to Super Liquor's letter dated January 20, 2010.

Analysis -- Although it is recognized that the employment of a private security guard is an additional cost to the business, the record is clear that Super Liquor has significant problems relating to littering, loitering and drinking in public. The condition is legally defensible and staff recommends that this condition not be removed. Staff does recommend that the condition be modified to clarify the role of the security guard, i.e., that they need not confront offenders; that they observe and report; and that they not patrol private property. However, if the Council finds that the additional security conditions proposed by Super Liquor will have the same affect of controlling these problems, it should consider adopting these additional security conditions in lieu of the requirement for a security guard.

Condition 10 -- It shall be the responsibility of the business owner / operators of the business to remove identifiable litter of the business from the public right-of-way within a 500 ft. radius of said business, and make prompt notification to the Pasadena Police Department of instances of loitering or the public consumption of alcohol.

Request -- Modify so that litter removal is limited to the north side of E. Orange Grove up to 100 feet from the premises.

Analysis -- Super Liquor claims that a 500 foot radius is excessive in proportion to the size of their property. This is an incorrect analysis. The issue is whether the business is responsible for the litter. The condition addresses this by requiring that the business remove only identifiable litter. The record is clear that there is a litter problem; therefore, it is not excessive to require Super Liquor to remove only litter generated by their store. The condition is legally defensible, and staff recommends that this condition not be modified. However, information may be presented at the hearing which would mitigate the need for the full implementation of this condition.

Condition 18 -- All alcoholic beverage containers shall be identified with a sticker that has the name of the business establishment. Translucent plastic bags shall be identified in the same manner.

Request -- Eliminate the labeling requirement or modify in a commercially reasonable manner.

Analysis -- Litter and drinking in public were identified as significant problems. Identifying the alcoholic beverage containers and the translucent plastic bags in which they are transported will assist in identifying the place of purchase of the liquor being consumed in public and also identify the generator of the litter. The condition is legally defensible, and staff recommends that this condition not be modified. However, information may be presented at the hearing which would mitigate the need for full implementation of this condition or that would provide a better manner of identifying litter generated by the business.

Condition 19 -- Business hours of operation shall be between 7:00 a.m. and 9 p.m. daily with the sale of alcohol to occur only between the hours of 9:00 a.m. and 6:00 p.m., daily.

Request -- Permit the sale of alcoholic beverages from 9 a.m. to 9 p.m. and overall operation from 6:30 a.m. to 10:00 p.m.

Analysis -- The record includes evidence that there was a significant problem with loitering around the premises, including, among other times, early mornings and evenings. The condition is legally defensible, and staff recommends that this condition not be modified. However, information may be presented at the hearing which would mitigate the need for full implementation of this condition, or suggest modification of the

hours of operation by setting different times that would address the loitering issues and reduce the hours from their past operation, but slightly increase the hours from the existing condition.

Should the Council approve any of the requested modification and/or approve any of the clarifications, it is recommended that the Council direct the City Attorney to draft such clarification or modification language.

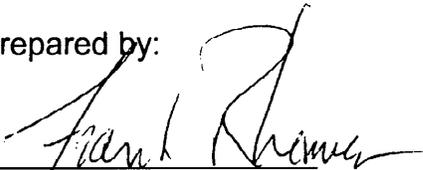
Respectfully submitted,

Handwritten signature of Michele Beal Bagneris, dated 1/21/10.

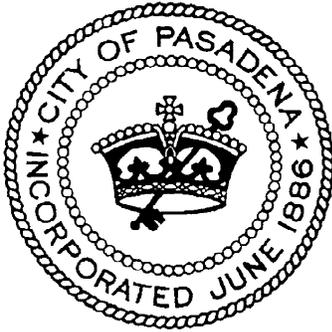
for

MICHELE BEAL BAGNERIS
City Attorney

Prepared by:

Handwritten signature of Frank L. Rhemrev.

Frank L. Rhemrev
Assistant City Attorney



Agenda Report

TO: CITY COUNCIL

DATE: JULY 27, 2009

FROM: CITY MANAGER

SUBJECT: APPEAL OF CODE ENFORCEMENT COMMISSION PANEL ORDER
RE: SUPER LIQUOR – 125 E. ORANGE GROVE BLVD.

RECOMMENDATION:

It is recommended that the City Council:

1. Conduct a public hearing;
2. Following the public hearing, confirm the action of Panel No. 3 of the Code Enforcement Commission to impose conditions 1 through 20 found in Attachment 1.

BACKGROUND:

Appellants Kum Man Jhae and Kun Chin Jhae are doing business as "Super Liquor" located at 125 E. Orange Grove Boulevard. The Deemed Approved Ordinance (Pasadena Municipal Code Chapter 8.18) was adopted to insure that alcoholic beverage retail sales establishments which are nonconforming because they do not have a conditional use permit for alcohol sales have no adverse impact on the community. Super Liquor does not have a conditional use permit but its operation is "deemed approved" pursuant to Chapter 8.18. The ordinance requires that these "deemed approved" liquor stores comply with the performance standards set forth in section 8.18.060.

The Deemed Approved Alcoholic Beverage Retail Sale Ordinance (see Attachment "3") allows the City greater local control over those establishments that are not regulated by conditional use permits by requiring that they adhere to certain performance standards relating to operating as a public nuisance. If an establishment fails to adhere to imposed performance standards, the City is able to impose additional conditions.

On June 4, 2009, a public hearing was held by Panel No. 3 of the Code Enforcement Commission concerning violations of the Pasadena Municipal Code at Super Liquor.

Based upon findings previously made by the California Department of Alcoholic Beverage Control, the Code Enforcement Commission determined that the operation of Super Liquor constituted a nuisance under P.M.C. Section 8.18.060(A)(4)(5).

The Code Enforcement Commission, after a noticed hearing approved the conditions as set forth in "Attachment 1" and directed Kum Man Jhae and Kun Chin Jhae to take corrective actions by July 6, 2009.

ANALYSIS:

In correspondence dated March 17, 2009 and written by Hilarie B. Vasquez, District Administrator for the Monrovia District Office of the California Department of Alcoholic Beverage Control, it was reported that between the months of January 2007 and April 2008 the licensees of "Super Liquor" kept or permitted in conjunction with a "licensed premise, a disorderly house, or to which people resort, to the disturbance of the neighborhood or in which people abide or resort which is injurious to the public moral (sic), health, convenience or safety." Support for this determination was provided in the form a decision letter dated March 13, 2009, which indicated that the licensees had filed a "stipulation and waiver" with the ABC wherein the licensees waived their rights to a hearing, reconsideration and appeal, and in which the ABC had confirmed that the licensees had "violated or permitted violations of Business & Professions Code Section(s) 25601¹, 24200(e)² and 24200.5³(a).

The Department of Alcoholic Beverage Control found that Super Liquor was a public nuisance and imposed the following conditions:

1. Wine products with an alcohol content greater than 14.9% are prohibited.
2. Fortified beer and/or malt beverages with an alcohol content greater than 5.7% are prohibited.
3. Beer, malt beverages, and wine coolers in containers of 12 oz. or less cannot be sold by single containers, but must be sold in manufacturers pre-packaged multi-unit quantities.

¹ B & P 25601 "Every licensee, or agent or employee of licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor.

² B & P 24200(e) "The following are grounds that constitute a basis for the suspension or revocation of licenses: [e] Failure to take reasonable steps to correct objectionable conditions on the licensed premises, including the immediately adjacent area that is owned, leased, or rented by the licensee, that constitute a nuisance, within a reasonable time after receipt of notice to make those corrections from the department, under Section 373(a) of the Penal Code. For the purpose of this subdivision only, "property or premises" as used in Section 373(a) of the Penal Code includes the area immediately adjacent to the licensed premises that is owned, leased, or rented by the licensee.

³ B & P 24200.5(a) "Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds: [a] If a retail licensee has knowingly permitted the illegal sale, or negotiations of sales, of controlled substances or dangerous drugs upon his or her licensed premises. Successive sales, or negotiations of sales, over any continuous period of time shall be deemed evidence of permission. As used in this section, "controlled substances" shall have the same meaning as is given that term in Article 1 (commencing with Section 11000) of Chapter 1 of Division 10 of the Health and Safety Code, and "dangerous drugs" shall have the same meaning as is given to that term in Article 2 (commencing with Section 4015) of Chapter 9 of Division of this code.

4. The licensee is prohibited from packaging merchandise in anything other than clear plastic bags.
5. No alcoholic beverages shall be consumed on any property adjacent to the licensed premises under control of the licensee(s) as depicted on the ABC-257 and ABC 253 dated (Pursuant to Condition a).
6. Loitering is prohibited on or around these premises or the area under the control of the licensee(s) as depicted on ABC-257 dated (Pursuant to Condition a).

After a public hearing the Code Enforcement Commission, relying on the finding by the Department of Alcoholic Beverage Control to make a determination that Super Liquor operated as a public nuisance, imposed conditions to insure that the business will comply with the performance standards as set forth in section 8.18.060 of the Pasadena Municipal Code.

After hearing presentation of the staff report, testimony from various City staff, the licensee and approximately 1 ½ hours of testimony from members of the public in which various scenarios and descriptions of public drunkenness, public defecation, public urination, prostitution and other unlawful acts were described, Panel No. 3 of the Code Enforcement Commission approved 20 separate performance conditions regarding the general operation of Super Liquor. Those conditions are set forth in "Attachment "1"" herein.

FISCAL IMPACT:

Approval of the conditions in "Attachment 1" are intended to result in fewer police calls to the site, therefore reducing the fiscal burden on the City.

Respectfully submitted,



MICHAEL J. BECK
City Manager

Prepared by:



Jon A. Pollard
Code Compliance Manager

Approved by:



Richard J. Bruckner
Director of Planning and Development

Attachments:

1. Commission's Directed Corrective Action – Items 1 through 20 inclusive.
2. Staff Report to the Code Enforcement Commission – Super Liquor Hearing
3. Pasadena Municipal Code – Deemed Approved Ordinance